

ESTTA Tracking number: **ESTTA503105**

Filing date: **10/31/2012**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Activision Publishing, Inc.
Granted to Date of previous extension	10/31/2012
Address	3100 Ocean Park Boulevard Santa Monica, CA 90405 UNITED STATES
Attorney information	Alexa L. Lewis Mitchell Silberberg & Knupp LLP 11377 West Olympic Boulevard Los Angeles, CA 90064 UNITED STATES all@msk.com, kls@msk.com, mem@msk.com, kgp@msk.com Phone:(310) 312-2000

Applicant Information

Application No	85424172	Publication date	07/03/2012
Opposition Filing Date	10/31/2012	Opposition Period Ends	10/31/2012
Applicant	Funzio, Inc. Suite 425 500 Howard St. San Francisco, CA 94105 UNITED STATES		

Goods/Services Affected by Opposition


Class 009. All goods and services in the class are opposed, namely: Downloadable computer game programs
Class 041. All goods and services in the class are opposed, namely: Entertainment services, namely, providing an on-line computer game

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Mark Cited by Opposer as Basis for Opposition

U.S. Registration No.	3987485	Application Date	10/15/2010
Registration Date	07/05/2011	Foreign Priority Date	NONE

Word Mark	MODERN WARFARE
Design Mark	
Description of Mark	NONE
Goods/Services	Class 009. First use: First Use: 2007/11/05 First Use In Commerce: 2007/11/05 Computer game software; computer game software and related instruction manuals sold together as a unit; computer game cartridges; computer game discs; interactive multimedia computer game programs; downloadable computer game software

Attachments	76704907#TMSN.gif (1 page)(bytes) 85-424,172 MODERN WAR - Consolidated Notice of Opposition (4946062).PDF (7 pages)(58580 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/s/ Alexa L. Lewis
Name	Alexa L. Lewis
Date	10/31/2012

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

ACTIVISION PUBLISHING, INC.,)	
)	Opposition No. _____
Opposer,)	
)	
v.)	App. No. 85/424,172
)	Mark: MODERN WAR
FUNZIO, INC.,)	
)	App. No. 85/424,176
Applicant.)	Mark: MODERN WAR BY FUNZIO

CONSOLIDATED NOTICE OF OPPOSITION

Activision Publishing, Inc. (“Activision”), a Delaware corporation with a business address at 3100 Ocean Park Boulevard, Santa Monica, California 90405, believes that it will be damaged by the registration of the marks that are the subjects of the following Applications: (1) Application No. 85/424,172 (“MODERN WAR”) and (2) Application No. 85/424,176 (“MODERN WAR BY FUNZIO”). Activision hereby opposes the registration of these two marks on the following grounds:

1. Activision is the owner of the mark MODERN WARFARE as used to identify, *inter alia*, computer game software; computer game software and related instruction manuals sold together as a unit; computer game cartridges; computer game discs; interactive multimedia computer game programs; downloadable computer game software; and related goods and services and merchandise associated therewith.
2. In addition to its common law use, Activision is the owner of Registration No. 3,987,485 as issued by the U.S. Patent and Trademark Office (“PTO”) on July 5, 2011 for the mark MODERN WARFARE. As proof of status and title, attached as

Exhibit A hereto and incorporated by reference herein is a true and correct copy of the Certificate of Registration for the foregoing registration of MODERN WARFARE.

3. Activision has expended considerable funds and made significant efforts in promoting and advertising Activision's goods identified by the mark MODERN WARFARE, and the goods identified by this mark have enjoyed enormous commercial success, won various industry awards and been the subject of substantial, unsolicited media attention. As a result, Activision has established an enviable reputation, acquired substantial goodwill, and attained distinctiveness in the mark MODERN WARFARE throughout the entire United States.

4. Activision's rights in the mark MODERN WARFARE notwithstanding, Applicant filed on September 15, 2011 with the PTO the following intent-to-use Applications: (1) No. 85/424,172, to register the mark MODERN WAR to identify "downloadable computer game programs" and "entertainment services, namely, providing an on-line computer game," and (2) Application No. 85/424,176, to register the mark MODERN WAR BY FUNZIO to identify "downloadable computer game programs" and "entertainment services, namely, providing an on-line computer game" (hereinafter the "Opposed Applications").

5. Activision's use and/or constructive use rights for the mark MODERN WARFARE are prior to any rights of Applicant in the marks MODERN WAR and MODERN WAR BY FUNZIO.

6. In view of the similarities between, on the one hand, Activision's mark MODERN WARFARE and, on the other hand, the marks that are the subject of the Opposed Applications (MODERN WAR and MODERN WAR BY FUNZIO), and the

relationship between Activision's goods as identified by its MODERN WARFARE mark and the goods identified in the Opposed Applications, it is likely that members of the public will erroneously believe that Applicant's goods originate with, or are in some manner connected or associated with, or sponsored by, Activision, all to the harm and detriment of Activision's goodwill and reputation.

7. Applicant's MODERN WAR mark so resembles Activision's MODERN WARFARE mark and registration when used on or in connection with Applicant's goods as to be likely to cause confusion, mistake or to deceive, and such Application is therefore precluded from registration under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). Likewise, Applicant's MODERN WAR BY FUNZIO mark so resembles Activision's MODERN WARFARE mark and registration when used on or in connection with Applicant's goods as to be likely to cause confusion, mistake or to deceive, and such Application is therefore precluded from registration under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

8. If Applicant is granted registration of the marks MODERN WAR or MODERN WAR BY FUNZIO, Applicant would obtain a prima facie exclusive right to use of its marks that would cause damage and injury to Activision.

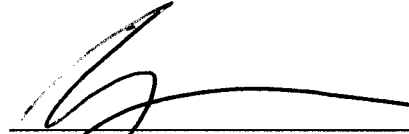
9. These Oppositions are appropriately consolidated because Activision's claims against the Opposed Applications involve common (i.e., similar) questions of law or fact. Among other things, the Opposed Applications involve the same parties, the same registered mark is at issue (MODERN WARFARE), and the Opposed Applications involve similar marks.

WHEREFORE, Activision respectfully requests that this opposition be granted and that Application Nos. 85/424,172 (MODERN WAR) and 85/424,176 (MODERN WAR BY FUNZIO) be denied registration.

Respectfully submitted,

Date: October 31, 2012

By:

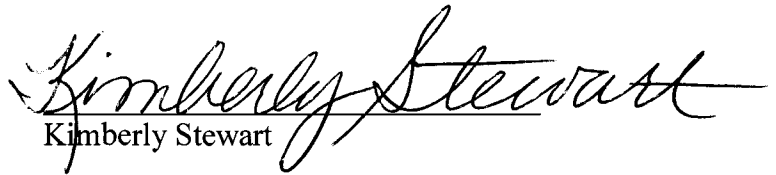
A handwritten signature in black ink, appearing to be 'Marc E. Mayer', is written over a horizontal line.

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being transmitted electronically through ESTTA pursuant to 37 C.F.R. § 2.195(a) on October 31, 2012.


Kimberly Stewart

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2012, a true and correct copy of the foregoing **CONSOLIDATED NOTICE OF OPPOSITION** was served upon Applicant's counsel of record by U.S. Mail to the following address:

Eugene M. Pak
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Kimberly Stewart

EXHIBIT A

EXHIBIT A

United States of America

United States Patent and Trademark Office

MODERN WARFARE

Reg. No. 3,987,485

Registered July 5, 2011

Int. Cl.: 9

TRADEMARK

PRINCIPAL REGISTER

ACTIVISION PUBLISHING, INC. (DELAWARE CORPORATION)
3100 OCEAN PARK BOULEVARD
SANTA MONICA, CA 90405

FOR: COMPUTER GAME SOFTWARE; COMPUTER GAME SOFTWARE AND RELATED INSTRUCTION MANUALS SOLD TOGETHER AS A UNIT; COMPUTER GAME CARTRIDGES; COMPUTER GAME DISCS; INTERACTIVE MULTIMEDIA COMPUTER GAME PROGRAMS; DOWNLOADABLE COMPUTER GAME SOFTWARE, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

FIRST USE 11-5-2007; IN COMMERCE 11-5-2007.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 3,403,754.

SEC. 2(F).

SER. NO. 76-704,907, FILED 10-15-2010.

MARCIE MILONE, EXAMINING ATTORNEY



David J. Kappas

Director of the United States Patent and Trademark Office